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SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No.

FORT DIX APARTMENTS CORP., a corporation,
Petitioner,

vs.

BOROUGH OF WRIGHTSTOWN, a municipal corporation and I. HAINES CROSHAW, Collector of Taxes for the Borough of Wrightstown,
NEW HANOVER TOWNSHIP BOARD OF EDUCATION,
COUNTY OF BURLINGTON,
Respondents.

No.

SHERIDANVILLE, INC., a corporation,
Petitioner,

vs.

BOROUGH OF WRIGHTSTOWN, a municipal corporation and I. HAINES CROSHAW, Collector of Taxes for the Borough of Wrightstown,
TOWNSHIP OF SPRINGFIELD, a municipal corporation, and R. J. BEAZLEY, Collector of Taxes for the Township of Springfield,
NEW HANOVER TOWNSHIP BOARD OF EDUCATION,
COUNTY OF BURLINGTON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Fort Dix Apartments Corp. and Sheridanville, Inc., pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above-entitled cases.

REFERENCE TO OPINIONS BELOW.

The two above-entitled cases were consolidated for trial and argument in the United States District Court for the District of New Jersey. The opinion of that Court is reported in 125 F. Supp. 743, and is printed in Appendix A, infra, at page 29. The opinion of the United States Court of Appeals for the Third Circuit, and the dissenting opinion, which are as yet unreported, are printed in Appendix C, infra, at page 51.

JURISDICTION.

The judgments of the United States Court of Appeals for the Third Circuit were entered on August 23, 1955. The jurisdiction of this Court is conferred by the Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. §1254 (1).

QUESTIONS PRESENTED.

Petitioners each have constructed apartment projects on a military reservation under the exclusive jurisdiction of the United States, on lands leased to them by the Secretary of the Army. In one case, title to the buildings is in the

United States; in the other, in the lessees. The normal municipal services are supplied by the United States, not the municipalities within whose limits the leased lands allegedly lie. The overall question presented is whether the municipalities may collect taxes on the leasehold interests of petitioners. This involves the questions whether Congress has retroceded its exclusive jurisdiction, whether Congress has consented to the taxes, and whether the taxes are constitutionally valid where all normal services are supplied not by the local taxing authorities but by the United States of America and are paid for by the plaintiffs.

STATUTES INVOLVED.

The statutes principally involved are the Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. §1748 and the Act of August 5, 1947, 61 Stat. 774, 10 U. S. C. §1270, and are quoted in Appendix E, infra, at page 58.

STATEMENT OF THE CASE.

These are separate suits which were consolidated for trial in the United States District Court. Except for certain points of difference, summarized hereinafter, the facts and issues in both cases are similar. Separate records exist as to each case, and references to both records are made. For convenience, the transcript of the Fort Dix Apartments Corp. record is referred to as "Tr. F." and of the Sheridanville, Inc. record as "Tr. S."

The principal facts in each case were agreed to by stipulation. Plaintiffs each have constructed an apartment proj-

ect on the Fort Dix Military Reservation, on lands leased to them by the Secretary of the Army (Tr. F5a; Tr. S20a). These leases were for 75 years and required each of plaintiffs to erect, maintain and operate a housing project on the leased land (Tr. F7a; Tr. S20a). The projects have been constructed and financing has been secured under provisions of the National Housing Act (Tr. F8a; Tr. S20a). Under the terms of the lease to plaintiff Fort Dix Apartments Corp., title to the buildings is in the United States, and the said plaintiff has no right to remove them (Tr. F20a). The lease to Sheridanville, Inc., does not contain this provision, but provides that title to improvements is in lessees during the term of the lease (Tr. S28a). Both projects must be rented to persons designated by the Commanding Officer of Fort Dix and presently, all of the units of both projects are leased to military personnel stationed on Fort Dix Military Reservation (Tr. F8a; Tr. S23a). Originally, the rents prescribed by the Federal Housing Administration did not contemplate taxes on the project. The Borough of Wrightstown has assessed both projects for taxes, and the Township of Springfield has also assessed the Sheridanville, Inc. project for taxes. Because of these taxes, there has been granted a rent increase to plaintiff Fort Dix Apartments Corp., to cover the amount of the taxes assessed, and under the terms of the agreement providing for the rent increase, the sums collected by the plaintiff, Fort Dix Apartments Corp., from the tenants are held in escrow until the determination of the validity of the taxes assessed, and if the taxes are declared to be invalid, the sums held in escrow will be returned to the individual tenants (Tr. F9a). There has been no increase granted as to Sheridanville, Inc., and no such escrow agreement exists as to it.

All of the normal services and benefits, such as water and sewer facilities, garbage and trash collections, fire and police protection, and snow and road maintenance are sup-

plied not by the Borough of Wrightstown, but by the military authorities at Fort Dix Military Reservation and these services are paid for by the plaintiffs (Tr. F8a; Tr. S28a). Schooling is furnished by the Pemberton Township Board of Education and Federal aid is paid to Pemberton Township in this regard. Five children from the projects attend local schools in Wrightstown (Tr. F10a, F66a, F68a; Tr. S18a, S43a, S45a).

The stipulation states the question of the right to vote is a legal question and each party reserved its right to argue this point (Tr. F10a; Tr. S19a). Plaintiffs contend that the residents of the projects cannot vote and in fact the civilian Superintendent of the Fort Dix Apartments Corp., project and his wife, were so advised by the Burlington County Board of Elections (Tr. F100a; Tr. S87a).

Plaintiffs each commenced suit to restrain collection of the taxes assessed and for other relief. In both cases New Hanover Township Board of Education and County of Burlington intervened as interested parties. In the Sheridanville, Inc. case the project is in both the Borough of Wrightstown and the Township of Springfield, and for that reason the Township of Springfield and its tax collector are defendants but are not in the Fort Dix Apartments Corp. case.

After a hearing on the stipulations of facts, briefs and arguments of counsel, Chief Judge Forman filed an opinion ordering a dismissal of the complaints (Tr. F76a; Tr. S88a).

On motion for a stay of collection of taxes pending appeal, Chief Judge Forman granted such an injunction on the condition that plaintiffs deposit the amounts of the taxes with the Clerk of the United States District Court (Tr. F100a; Tr. S88a). This was done, and plaintiffs each thereafter appealed from the final judgment dismissing both complaints.

The United States Court of Appeals, by a two to one decision, affirmed the judgment of dismissal. By consent

order, the injunction against collection of the taxes pending the determination of the petition for certiorari has been continued on the condition that the amounts of the taxes and interest be deposited with the District Court Clerk as they become due.

In summary the material factual differences in the two cases are:

(1) Springfield Township and its tax collector are defendants in the Sheridanville, Inc. case, as well as Borough of Wrightstown and its tax collector, because that project is partly in that Township and partly in the Borough of Wrightstown. The project of Fort Dix Apartments Corp. is entirely within the limits of Borough of Wrightstown.

(2) The lease to Fort Dix Apartments Corp. provides that as the buildings are constructed, title passes to the United States of America. The lease to Sheridanville, Inc. does not so provide, title remaining in the lessee.

(3) Fort Dix Apartments Corp. has received a rent increase because of the taxes assessed and there is an escrow agreement regarding same. Sheridanville, Inc. has not secured such an increase.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT.

The Federal question as to whether the United States Constitution and statutes preclude the taxes in question is the issue in the case and is the basis for Federal Jurisdiction. The question was presented in the Complaint and was decided by the United States District Court and the United States Court of Appeals for the Third Circuit.

REASONS FOR ALLOWANCE OF WRIT.

The projects in question were built under the Wherry Act,[1] which was passed to provide much needed housing for military personnel and "at rentals comparable to or lower" than those which many of them were paying for inadequate quarters. There are many such projects in the United States, and the question of the right to tax the leasehold is a nationwide question. If the taxes are valid, they result in higher rentals for the military, as the rentals allowed by the Federal Housing Commissioner are based upon the costs of the projects. So, in the Fort Dix Apartments Corp. case there is in effect an escrow agreement whereby the tenants pay the increase in the rental due to the taxes, and it is placed in an escrow account pending the final determination of this litigation.

Yet, for these taxes, the municipalities are not furnishing any services to the projects. Chief Judge Forman, United States District Court of New Jersey, although ruling against petitioners, made the following comments on the application for an injunction pending appeal: [2]

> "You see basically, counsellor, this is a matter that should have careful reconsideration by an appellate court. Basically this will be something of a technical windfall, if we examine the facts carefully, to the citizens of these communities.
>
> "Now I have decided in their favor, very true, but they are not spending any money for sewage or gar-

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[1] Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. §1748. Appendix E, infra, page 58.

[2] Page 8 of transcript of hearing on motion, November 1, 1954.

bage collection or many of the normal services that would be actual money laid out by them. I consider it a technical situation in the law that makes them entitled to these taxes, but when considering equities that also has to be taken into consideration.

"Just why the tax rate should be sixteen dollars a hundred under these circumstances I wouldn't know. You can only estimate from that that nearly half of the taxes are going to come from these two apartment houses. That is a neat situation."

Petitioners urge the allowance of the writ for the following reasons, which we will present in further detail hereafter.

(I) As to one of the two statutes which have been urged as permitting the taxes (the 1947 Act) [3] the United States District Court and the United States Court of Appeals for the Third Circuit have rendered conflicting interpretations. Both the District Court Judge and the dissenting Judge in the Circuit Court interpreted the 1947 Act as *not* permitting the taxes. The two judges concurring in the majority opinion of the Circuit Court interpreted it as permitting the taxes.

(II) As to the other of the two statutes which have been urged as permitting the taxes (the 1949 Act), the United States District Court Judge interpreted it as permitting the taxes and the dissenting Judge in the Circuit Court interpreted it as *not* permitting the taxes. The Judges rendering the majority opinion of the Circuit Court did not state what their interpretation was.

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[3] Act of August 5, 1947, 61 Stat. 774, 10 U. S. C. §1270. Appendix E, infra, page 61.

III. The opinion of the United States Court of Appeals for the Third Circuit does not recognize the distinction urged by Petitioners between a retrocession of exclusive jurisdiction and a mere consent to tax property owned by the United States in non-exclusive jurisdiction areas. Also the opinion fails to analyze the absence of services and benefits as a constitutional bar to the taxes.

(IV) The question is nationwide in importance. The dissenting Judge in the Circuit Court stated well the importance of the matter as follows (Appendix C, infra, page 56):

> "Without sound basis under either statute the majority decision is doubly unfortunate in greatly weakening as it does the fine inducement to remain in the armed services given by the 1949 Act to experienced married service men by supplying them with housing they can afford and thus enabling them to have normal married lives within the military establishment."

We wish now to present these reasons in further detail.

I and II. The 1947 and 1949 Acts and the conflicting interpretations.

In 1947, there was passed an Act to permit the leasing of standby facilities of the Government. This is the Act of August 5, 1947, 61 Stat. 774, 10 U. S. C. §1270. We refer to it as the 1947 Act. Pertinent provisions are printed in Appendix E, infra page 61. Section 6 of this Act reads as follows:

> "The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation."

The Senate Report on this legislation (No. 626), U. S. Code Cong. Service, 80th Congress, First Session, 1947, page 1592 revealed the purpose was primarily to authorize the leasing to responsible companies of stand-by facilities which had been financed by the Government.[4]

In 1949, to provide much needed housing for military personnel, there was passed the Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. §1748. We refer to it as the 1949 Act, or the Wherry Act.

The House Report on this Act, No. 854, 81st Congress, 1st Session, U. S. Code Cong. Service, 1949, page 1757, makes clear that its purpose was to encourage the construction by private enterprise of rental housing for military personnel at rentals comparable to or lower than those which many of them were paying for inadequate quarters. It was recog-

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[4] "The purpose of this bill, as amended, is to broaden and make uniform the authority of the War and Navy Departments, to lease Government property and to permit the transfer of certain plants, machinery and equipment to their custody without reimbursement to the Reconstruction Finance Corporation or the War Assets Administration. The necessity for the proposed legislation arises primarily out of the facilities stand-by program of the War and Navy Departments, under which these Departments among other things, will retain title for an indefinite period to a selected group of plant facilities. These plants were financed by the Government during the emergency, at tremendous expense and were built for the manufacture of such items as proximity fuses, ammunition, explosives, etc. While all of these plants may not be adaptable to peace time uses, as many as possible will be leased to responsible companies which can operate them without making such changes as to prevent their being rapidly put back into operation in the event of emergency. All leases made under this section are revocable in time of national emergency * * *; and if the plant is no longer needed in the stand-by program, the leases could be revoked and the property declared surplus." * * *

"Section 6 provides that the interest a lessee holds under this act shall be subject to State or local taxes. In the event of States, not presently having legislation permitting the taxing of such property, enacting such laws subsequent to the negotiation of a lease under this act, this section provides that the lease can be renegotiated."

nized that this was essential to attract and hold highly trained men in the military services.[5]

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[5] "The purpose of the bill (12 U. S. C. A. §1748) is to encourage private enterprise to construct rental housing to serve the needs of personnel at military installations primarily through (1) the provision of a special form of mortgage insurance designated to meet the particular problems involved (2) the leasing of sites by the Military Establishment free from the right of revocation and (3) the provision of utility services by the Military Establishment on a long-term basis."

"Under existing legislation there is no specific authority which permits the Federal Housing Administration to assist in the financing of housing to serve the personnel at military installations on any different basis than other housing not related to military personnel."

* * * * * * * * * * *

"The provisions of the bill would authorize the Military Establishment to lease or sell lands * * *. In the case of leases of building sites, the leases * * * could be made without regard to the existing limitation with respect to right of revocation by the Government in the event of the declaration of a national emergency * * *. The leasing of such sites by the Military Establishment at nominal considerations would further make possible the achievement of lower rentals for the personnel of the establishment.

"* * * As noted above, however, any utility or related service provided and sold under this authority shall not be so provided unless it is determined that the utility or related service is not at the time of such sale or contract to sell, available from a private or other public source, and that the furnishing thereof is in the interest of the national defense."

* * * * * * * * * * *

"Representatives of the three branches of the National Military Establishment, appearing before your committee, strongly urged the enactment of this measure. * * * They made it abundantly clear that, to attract and hold the highly trained, experienced and technical personnel now required * * * it is essential that this personnel be afforded an opportunity to live comfortable and normal lives * * * The fact that most of them do not now have this privilege is a major contributing factor to the existence of a morale problem that bears on the effectiveness of our armed forces, to the difficulties in recruiting able men, and to the large percentage of trained men who are failing to re-enlist at the expiration of their enlistment terms."

"* * * It is therefore extremely important that private builders be encouraged to construct as much of this housing as possible."

"The bill is designed to encourage them to construct such housing."

"* * * However, such mortgage insurance should encourage the production of substantial additions to the housing supply available to personnel at military installations and at rentals comparable to or lower than those which many of them are now paying for inadequate quarters. * * *"

It is significant that nowhere in this House Report is there a mention that the lessee's interest is to be taxable, as was mentioned in the Senate Report on the 1947 legislation.

The only reference to taxation in this 1949 Act is the following, which is contained in Section 807 of the Act and is found in 12 U. S. C. §1748f:

> "Nothing in this title shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed." 12 U. S. C. §1748f.

The District Court of New Jersey held that the 1947 legislation was not effective as to leases under the 1949 Act, and that the taxes could not be sustained under Section 6 of the 1947 Act. In this respect the District Court opinion said (Appendix A, infra, page 42):

> "It is the defendants' contention that this recognition is carried from the 1947 to the 1949 legislation and constitutes a recession by the United States to the State of New Jersey and its subdivisions of the right to tax property leased under the Military Housing Insurance Act. This contention cannot be approved since it appears that the reason for the reference in the 1949 legislation to the 1947 legislation was to define the types of property which the Secretaries could use for the purpose of the Military Housing Insurance Act and that was such property as was described in the 1947 legislation as was 'under the control of his Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, * * *'"

We submit that this is the proper interpretation of the 1949 Act. The dissenting Judge in the Circuit Court agreed saying (Appendix C, infra, page 55):

> "I am unable to see how these seventy-five year apartment house leases can be brought within the 1947 Act which gave authority to lease defense plants to private industry for not more than five years. The plain reason for the reference in the 1949 statute to the 1947 law was to define the types of property which the Secretaries could use for the purpose of the Military Housing Insurance Act (the 1949 Act) as the district judge held."

The majority of the Circuit Court held otherwise, saying that the 1947 Act was applicable to the leasing of property generally and not limited to stand-by defense plants; and that accordingly Section 6 of the 1947 Act applied to leases under the 1949 Act.

As to the 1949 legislation, the District Court Judge found a consent to tax in 12 U. S. C. 1748 f (Appendix A, infra, page 44).[6] The dissenting opinion in the Circuit Court dis-

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[6] The District Court opinion stated (Appendix A, infra, page 44):
"The foregoing statutory provision would appear to evidence the intent of the Government to manifest a relinquishment of this property from insulation from local taxation equally with what was legislated in the act authorizing the leasing of standby facilities. As was argued by the defendants certainly it could not have been the intention of the Congress that the Commissioner of the Federal Housing Administration in the event that he should be obliged to capture the property would be in a less preferred position with regard to local taxation than a private corporation such as either of the plaintiffs. While of course the lessees cannot bind the Government to a surrender of its immunity to local tax nevertheless they do show at least an acceptance of the eventuation of such a circumstance and they arrange to place the burden of its cost on the ultimate consumer—the lessees' tenants."

agreed (Appendix C, infra, page 56),[7] and the majority of the Court did not discuss the section.

In substance therefore, two Judges have held that the 1947 Act supports the taxes, and two have held otherwise. One Judge has held the 1949 Act allows the taxes and one has held otherwise.

With such equal divergence of opinion, it is difficult to comprehend how either of the Acts in question can be said to contain a clear consent to tax which is necessary to support the right to tax.

III. The opinion of the United States Court of Appeals for the Third Circuit does not recognize the distinction urged by Petitioners between a retrocession of exclusive jurisdiction and a mere consent to tax property owned by the United States in non-exclusive jurisdiction areas. Also the opinion fails to analyze the absence of services and benefits as a constitutional bar to the taxes.

Petitioners believe that the following arguments on these points are fundamental in any consideration of the issues involved.

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[7] The dissenting opinion stated (Appendix C, infra, page 56):

"Nor is there anything in the 1949 Act itself which will support this attempted taxation. The language of the Act relied on by the municipalities reads 'Nothing in this title shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation and by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed.' That clause means here as it does in other titles of the National Housing Act that where property mortgaged under the National Housing Act is acquired by the Commissioner it is not exempted from taxation merely because of the new ownership by an agency of the United States."

(A) THE EXCLUSIVE JURISDICTION OF THE LANDS INVOLVED HAD NOT BEEN RETROCEDED BY THE UNITED STATES.

It is fundamental that lands within the exclusive jurisdiction of the United States of America are beyond the taxing power of the State.[8] The State has no jurisdiction to tax, and before a State can validly tax, Congress must first retrocede exclusive jurisdiction. In those situations where Congress must consent in order to give the State jurisdiction in a Federal Area, over which the United States has exclusive jurisdiction, we find that clear and unequivocal language is used by Congress. Examples of the type of language which is used for the purpose of effecting a retrocession of exclusive jurisdiction in Federal Areas may be found in the *Buck Act of July 30, 1947*, C. 389, 61 Stat. 641, 4 U. S. C. §§105 and 106; the *Motor Fuel Taxes Act of July 30, 1947*, C. 389, 61 Stat. 641, 4 U. S. C. §104; the *Assimilated Crimes Act of June 25, 1948*, C. 645, 62 Stat. 683, 18 U. S. C. §13; *Workmen's Compensation Laws, Act of June 25, 1936*, C. 822, 49 Stat. 1938, 40 U. S. C. §290; *Wrongful Death Statutes, Act of Feb. 1, 1928*, C. 15, 45 Stat. 54, 16 U. S. C. §457.

We submit that Section 6 of the 1947 Act did not effect nor intend to effect a retrocession of exclusive jurisdiction in Federal Areas such as the Fort Dix reservation. Petitioners believe that an examination of the legislative history of the 1947 Act, as well as the language employed therein, will make clear that the Congress had no intention to retrocede any portion of the exclusive jurisdiction of the United States over Federal Areas by virtue of Section 6 of said Act.

The purpose of the 1947 Act was primarily to permit the

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[8] **Surplus Trading Co. v. Cook**, 281 U. S. 647, 74 L. Ed. 1091, 50 Sup. Ct. 455 (1930).

transfer of certain defense plants which had been acquired by the Defense Plant Corporation or the Reconstruction Finance Corporation in accordance with the authority contained in the *Reconstruction Finance Corporation Act* (see Act of Jan. 22, 1932, C. 8, 47 Stat. 5, as amended, August 23, 1935, C. 614, 49 Stat. 704, as amended, June 30, 1947, C. 166, 61 Stat. 202, as amended, May 25, 1948, C. 334, 62 Stat. 261, 15 U. S. C. §§601-617) to the War Department or the Navy Department; and to permit the War Department or the Navy Department to lease these plants to private industry for a limited period of time and subject to certain conditions including the right to revoke the lease in the event of national emergency.

The legislative history of the 1947 Act shows that Congress had in mind these defense plants which were to be leased to private companies, when the consent to taxation was included. And it further appears that Congress was simply confirming the right of the State to tax a leasehold interest in property owned by the United States. See Hearing before Senate Committee on Armed Services on S. 1198 (H. R. 3471), 80th Cong., 1st Sess., a bill to authorize loans of real or personal property by the War and Navy Departments, pp. 30-32.[9] Some doubt as to the right to tax had

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[9] "Senator Tydings: No. First of all, you would have to set up on the assessment books what the company actually owned. What he would own would be a lease. He would not own the property. Your law would not say that notwithstanding that he does not own any more than the lease, he shall be taxed on the property. He would go to the assessor and prove he only had a leasehold in it for 1 or 10 years. He could not be assessed more than his lease is worth. He could not be assessed for the physical value of the property because he does not own it. He could be assessed for what his lease is worth. That would be all."

"Mr. Royall: As I say, I understand the possessory interest tax has been applied, and I think it is constitutional. That would apply to this situation if it is constitutional, and I imagine it is.

"You could say in this statute, if there is any question about that, that the possessory interests of the lessee should be subject to local tax.

been expressed previously in Court decisions.[10] But we fail to find anywhere in the Congressional discussions any contemplation of a retrocession of exclusive jurisdiction by the inclusion of Section 6, and we submit that Congress had no such intention.

In this connection, it should be noted that the Reconstruction Finance Corporation and Defense Plant Corporation, which financed and owned defense plants, were taxable by the State as to their real property. 15 U. S. C. §607. These defense plants were authorized to be transferred to the War and Navy Departments without reimbursement,

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"Mr. Kenney: A local taxing authority can make the leasehold subject to tax if they want to. That is a matter for the local legislature to take care of.

"Senator Tydings: You cannot make a man pay taxes on what he does not own.

"Mr. Kenney: Your State could make the leasehold interest itself taxable, which I think should be all that could be taxable.

"Senator Tydings: That is right. Say the lease was for 5 years. You could take up the value of the lease, which would be an infinitesimal part of the value of the property."

"Senator Tydings: As a matter of fact, if the Government leases to corporation AB a plant for a period of 5 years without us doing anything about it, they would be taxable by each community in America that taxes leasehold property. So why should we put anything in?

"Mr. Kenney: I do not think that you should put anything in this bill.

"Senator Tydings: That is what I am getting at.

"Mr. Royall: I do not see any objection to putting it in there if there is any question about it. You had some language here that the possessor of the leasehold interest pursuant to this act may be subject to local or state taxation. That would help.

"Senator Tydings: Upon the lessee?

"Mr. Royall: That is right."

[10] **Indian Territory Illuminating Oil Company v. State of Oklahoma**, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779 (1916); **Oklahoma, ex rel., Oklahoma Tax Commission, et al. v. Barnsdall Refineries, Inc., et al.**, 296 U. S. 521, 56 Sup. Ct. 340, 80 L. Ed. 366 (1936); **United States of America and Mesta Machine Company, Appellants v. County of Allegheny, Pennsylvania**, 322 U. S. 174, 64 Sup. Ct. 908, 88 L. Ed. 1209 (1944).

and the 1947 Act further authorized the leasing of these plants to private companies. We submit that the intention of Congress was to eliminate any claim of tax exemption by the private lessee because the plants were United States property, and that they were not even considering the possibility of tax exemption because a plant might be on lands under the exclusive jurisdiction of the United States, and consequently certainly never intended to retrocede any such exclusive jurisdiction by the inclusion of Section 6.

Opposing counsel in their briefs in the Circuit Court, argued that in the instant case there had been a retrocession by the 1947 Act and that the burdens of providing the normal municipal services had been thereby shifted to the municipalities. Yet, if such were the effect of the 1947 Act on the present lease, it would have had a similar effect on any lease of a defense plant on a Federal enclave, even though such leases were, by the terms of the 1947 Act for a period of not over 5 years, except in certain circumstances, and were revocable in time of national emergency. To conclude that such was the intention of Congress, we submit, is completely beyond any Congressional discussions or reports that we have been able to find.

It should be noted that the 1955 Amendments to the Housing Act have changed the leasing paragraph, and have eliminated the reference to the 1947 Act. Appendix E, infra, page 65. Also, the Government operates the projects. But the prior Wherry Act is left applicable to projects certified prior to June 30, 1955. Presumably, as to such later projects, the possibility of the 1947 Act being said to allow the taxes is eliminated.

Although the Circuit Court held that the taxes were valid because of the consent to tax in the 1947 Act, the opinion did not analyze the question of exclusive jurisdiction in that regard. This very case had been referred to by the Comptroller General of the United States in April, 1955, as pre-

senting that very question, whether a leasehold on lands in the exclusive jurisdiction of the United States could be taxed.[11] And, while the court's holding in effect resolves

[11] See letter, Comptroller General of the United States, Washington, April 18, 1955, to Hon. Harry F. Byrd, Chairman, Joint Committee on Reduction of Nonessential Federal Expenditures, Congress of the United States, made a part of the Congressional Record, Senate, May 2, 1955, page 4485. Pertinent excerpts from said letter are as follows:

"You have also expressed interest in the right of local communities to tax Wherry projects, particularly as that right may be affected by the provisions of the lease under which Government-owned land for a project is made available to a sponsor. The specific question you have raised in this connection is whether title to the buildings and other improvements placed on the Government-owned land by the sponsor should be vested in the Government or in the sponsor during the term of the lease * * *

"Considerable discussion was had during the legislative history of the bill which became the Leasing Act of 1947 as to local taxation of the plants to be leased * * *

"The hearings on the bill * * * indicate that it was assumed the plants to be leased could not be taxed locally, and the military departments intended to charge correspondingly high rentals to prevent lessees from securing a competitive advantage through freedom from local taxes * * *

"During the course of the Senate hearings the question of State taxation of the lessee's possessory or leasehold interest was discussed. It was stated to be the view of the War Department that property used for commercial purposes in any State should be taxed by the local authorities even though title to the property was in the United States * * *

"During the legislative history of the Wherry Act there was some discussion of the problem of local taxation but no significant conclusions were reached. It is, however, interesting to note the following comments on Wherry projects contained in the committee report on the 1950 school aid bill, Public Law 874, 81st Congress (64 Stat. 1100—House Committee on Education and Labor, Rept. No. 2287 on H. R. 7940, 81st Cong. June 20, 1950, p. 25):

" 'The term "Federal Property" is defined in Section 9 (1) to mean real property owned or leased by the United States which is not subject to taxation by any State or political subdivision. The term includes real property leased from the Secretary of the Army, Navy or Air Force under Section 805 of the National Housing Act, as amended, for the purpose of title VIII of such act. * * * This is the so-called Wherry-Spence housing recently authorized by Congress which is intended to play an important role in providing housing to military and civilian personnel

connected with Federal activities in areas suffering acute housing shortage. The State and local tax status of the federally-owned lands involved and of the housing to be constructed upon them under this section of the National Housing Act is not clear at this time, the situation being complicated by the fact that the program contemplates a lease of the land to private concerns to construct and manage the housing built on the land. If all or most of the real property values involved should turn out to be fully subject to State or local taxation, the inclusion of such property as Federal property under the bill would not be necessary. Pending settlement of this question, the bill includes this type of property.'"

"In our consideration of the proper construction to be given section 6 of the Leasing Act we have also studied the views of the Department of Defense as reflected in a letter to you under date of February 23, 1955 from Mr. Wilber M. Brucker, General Counsel of the Department. As is pointed out in that letter, it is by no means certain that the vesting of title to the buildings and other improvements in the sponsor (lessee) of a Wherry project would permit local authorities to tax such property because of the exclusive Federal jurisdiction over many of the areas involved. It is noted that the same point was mentioned by Assistant Attorney General Morton in his letter to you of January 18, 1955.

"The first sentence of section 6 of the Leasing Act specifically deals with local taxation of the lessee's 'possessory interest' under a lease. However, the property contemplated for leasing under this statute consisted of certain defense plants and machine tools, and the question of exclusive Federal jurisdiction over such property did not exist. Thus, the legality of imposing local possessory interest taxes * * * against a possessory interest in property such as a Wherry project which is located within exclusive Federal jurisdiction is not free from doubt. This precise question is now before the United States Court of Appeals for the Third Circuit in the appeal from the decision in Sheridanville, Inc. v. Borough of Wrightstown (125 F. Supp. 743) which was argued last month.

"It should also be noted that the porperty which was to be leased under the Leasing Act was already in existence and belonged to the United States. Since title to the property to be leased was already in the Government, it obviously was not contemplated that section 6 would compel the Government to transfer its title to the lessee in order to subject him to local taxation * * *

"In view of the legislative history of section 6 of the Leasing Act of 1947, it is not believed that the drafting of leases to vest title to Wherry Act improvements in the Government rather than in the sponsor can be considered illegal. We are of the opinion, and the Defense Department undoubtedly would agree, that local communities should not be required to furnish municipal services to Wherry projects without reimbursement. On the other hand, if the greater part of such services are furnished to the sponsor of a

the question, nevertheless the opinion fails to analyze the point.

Accordingly, we submit that the most that the provisions of Section 6 can be said to mean is that the lessee's interest in property within the territorial jurisdiction of a State is subject to taxation despite the fact that the United States Government continues to own the said property. Congress was explicitly consenting to the tax so that private industry could not escape taxation on said plants by contending that they were non-taxable because they were leased from the United States Government.

(B) NEITHER THE 1947 ACT NOR ANY OTHER ACT PROVIDES THE STATE OR ITS SUB-DIVISIONS WITH THE CONSTITUTIONAL BASIS FOR TAXATION, BECAUSE THE LOCAL TAXING AUTHORITY PROVIDES NONE OF THE SERVICES NORMALLY SUPPLIED BY A MUNICIPALITY.

All of the services normally furnished by the state, county and municipality are supplied by the United States Government on a reimbursable basis. Water and sewage facilities, garbage and trash collection, fire protection, snow removal and road maintenance are all provided by the military authorities at the Fort Dix Military Reservation and are charged to petitioners, pursuant to a contract between the United States and petitioners. Electric service is provided by Public Utility corporations and charged to peti-

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Wherry project by the Government on a reimbursable basis, there appears to be no justification for subjecting the property to taxation at full value.

"Because of the complicated legal problems involved, we believe that adjustment of the respective equities of the local communities and the Government can best be accomplished by legislation." * * *

tioners. Street lighting within the project has been erected and is operated and maintained exclusively by petitioners. Neither the state, county or municipality in which the lands are located furnish any such services and are not obligated to furnish any such services. In fact, the Secretary of the Army of the United States has determined that the services were not available from the state.[12] The children residing in the apartments of petitioners cannot attend the local schools on a free basis as do the children residing in the municipalities. The persons residing in said apartments cannot vote in any state, county or municipal elections.

Accordingly, even if Section 6 of the 1947 Act could be technically construed as covering property located on Federal Areas, it fails to provide any constitutional basis on which the state could levy a tax such as that levied in the instant cases.

Examining the law as to the basis of taxation, we find it to be fundamental that the right of taxation depends upon benefits and protections available to the taxpayer from the taxing authority. If such benefits and protections are not available, the "tax" is an "extortion" and violates the due process clause. This was the decision of the United States Supreme Court in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36 (1905), where a tax by the State of Kentucky on all the rolling

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[12] The contract for utilities and other services between the United States and Fort Dix Apartments Corp., recites (Tr. F.37a, F.38a):

"Whereas certain utilities and related services required to maintain and operate such housing project are not available from local private or public sources, but the government has facilities available at said military installation, and * * *

"Whereas, the Secretary of the Army has determined that the utilities and related services which are the subject of this contract, are not at the date hereof available from a local private or other public source and that the furnishing thereof is in the interest of national defense."

stock of a corporation, some of which were in Kentucky, and some not, was held unconstitutional. The Court said (p. 202):

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property * * * partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the legislature and a taking of property without due process of law.

"* * * But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. * * * In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. * * *

"Subject to these exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration. * * * It is often said protection and payment of taxes are correlative obligations." [13]

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[13] Expression of the same general doctrine is found also in **Frick v. Pennsylvania**, 268 U. S. 473, 69 L. Ed. 1058, 45 Sup. Ct. 603 (1925);

Considering the location of these apartment projects on lands of the Fort Dix Military Reservation and the absence of benefits or services from the municipality and in the absence of the right to free school education and the right to vote, it is hard to comprehend how a municipality could be said to have the right to levy a tax. This is particularly so where the net effect of the tax has been to increase the rents due from the military personnel occupying the apartments where the principal purpose of the construction of the apartments was to furnish much needed housing and lower rentals for them.

IV. The question is nationwide in importance.

The Department of the Air Force has advised that there are 259 Wherry Act projects, containing 67,767 housing units, in the country. Of these, 203 of the projects employed a form of lease giving title to the improvements to the United States, and the others, the earlier ones, give title to the lessees. 159 projects containing 53,339 units are on lands over which the United States has exclusive jurisdiction.

The question of taxability has arisen in a number of states. The Court of Appeals of Maryland, on a lease giving lessee title to the improvements, has held the lessee's interest to be taxable. *Meade Heights, Inc. v. State Tax*

Curry v. McCanless, 307 U. S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900 (1939); **Northwest Airlines, Inc. v. Minnesota**, 322 U. S. 292, 88 L. Ed. 1283, 64 Sup. Ct. 950 (1943); **The Pennsylvania Company for Insurance on Lives and Granting Annuities, et al. v. Kelly**, 134 N. J. Eq. 120, 34 A. (2) 538 (N. J. Prerog. Ct. 1943); **Ott v. Mississippi Valley Barge Line Co.**, 336 U. S. 169, 93 L. Ed. 585, 69 Sup. Ct. 432 (1948).

In **Wisconsin v. J. C. Penney Co.**, 311 U. S. 435, 85 L. Ed. 267, 61 Sup. Ct. 246 (1940), it was said: "The simple but controlling question is whether the state has given anything for which it can ask return."

Commission of Maryland, 202 Md. 20, 95 A. 2d 280 (1953). Alabama, Georgia and New York courts have ruled likewise.[14]

The Supreme Court of Nebraska, reversing the District Court of Sarpy County, Nebraska, has also held the lessee's interest taxable, on a lease giving title to the United States. *Offutt Housing Company v. County of Sarpy and Robert M. Eby, Treasurer of County of Sarpy, Nebraska*, 160 Neb. 320, 70 N. W. 2d 382 (1955). A petition for certiorari has already been filed in that case with the United States Supreme Court as of October Term, 1955.

Trial courts have held the lessees not taxable on the value of the improvements in Virginia, Massachusetts, New Mexico and Washington.[15] Similar litigation is pending in Texas, Mississippi, South Dakota, Missouri and Florida.[16] Attorneys General and other officials of 11 states have given

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[14] **Brookley Manor, Inc. v. State of Alabama,** now on appeal, No. 547, First Div. Sup. Ct., Alabama; **Fort Hamilton Manor v. Boyland,** pending on appeal No. 12,252, New York App. Div., 2nd Dept.; **Conley Housing Corp. v. Coleman,** No. 19001, Sup. Ct. Georgia, Sept. 12, 1955.

[15] **Thomason Park, Inc. v. County of Prince William,** Cir. Ct. of Prince William County, Virginia, decided January 5, 1955, appeal pending; **Westover Development Corp. v. Asselin,** Super. Ct. Hampden County, Mass., No. 74569, decided January 21, 1952; **Buena Vista Homes, Inc. v. Board of County Commissioners,** Dist. Ct., Dona Ana County, New Mexico, No. 13,213, 1954; **Moses Lake Homes, Inc. v. Grant County,** Super. Ct. for Grant County, Washington, No. 8095, opinions of October and December 1952 (not taxable after United States acquired title to buildings and improvements, taxable before).

[16] **Likins-Foster Biggs Corp. v. Deason, Tax Assessor,** U. S. D. Ct., W. D. Tex., El Paso Div., Civil No. 1562; **Board of Supervisors of Harrison County v. Military Housing, Inc.,** Keesler AFB Project, U. S. D. Ct., S. D. Miss., S. Div., Civil No. 1381; **Renel Heights, Inc. v. Gibbs, Treasurer,** 7th Jud. Cir. So. Dak., filed April 29, 1955; **State v. Personnel Housing Inc.,** Cir Ct., St. Louis County, Mo., No. 206031, Div'n 6; **Patrick Gardens v. Nash, Tax Collector,** Cir. Ct., 9th Jud. Cir., Brevard County, Florida, No. 13,852.

opinions that such projects are not taxable.[17] Attorneys General of two more states have ruled that the leasehold interest is taxable, but not the value of the buildings,[18] and the Attorneys General of two more states have ruled that leasehold interests are taxable except where the United States has exclusive jurisdiction.[19] These opinions are referred to in the petition for certiorari in the *Offutt Housing Company* case (pages 14 and 15), supra, and are collected in the office of the Chief, Management Branch, Family Housing Division, Directorate of Facilities Support, United States Department of the Air Force.

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[17] Connecticut, Letter from Attorney General George C. Conway to Hon. William F. Connelly, Tax Commissioner, Hartford, Conn., October 15, 1952; Colorado, letter from Attorney General John W. Metzger to L. B. Arnold, Vice President, Industrial Federal Savings, Denver, Colorado, October 9, 1950; Georgia, letter from Attorney General Eugene Cook to Hon. J. Archie Johnson, Tax Collector, Chatham County, August 11, 1952; Maine, memorandum from Assistant Attorney General Boyd L. Bailey to State Tax Assessor, March 16, 1953; Michigan, letter from Attorney General Frank G. Millard to D. Hale Brake, Treasurer of Michigan, January 16, 1951; New Mexico, letter from Attorney General Joe Martinez to N. R. Reese, District Attorney, Roswell, New Mexico, December 10, 1951; New York, informal opinion letter from Attorney General Nathaniel L. Goldstein to Department of the Air Force, May 1, 1952; Ohio, letter from Attorney General William O'Neill to M. H. Heck, Prosecuting Attorney, Montgomery County, May 21, 1952; South Dakota, letter from Attorney General Ralph A. Dunham to Col. Hubert Miller, Rapid City Air Base, April 7, 1952; Wyoming, letter from Assistant Attorney General Jack D. Froggatt to Walter B. Phelan, County and Prosecuting Attorney, Cheyenne, Wyoming, May 15, 1951; Oregon, letter from State Tax Commission Attorney S. B. Stewart to District Public Works Office, 13th Naval District, U. S. Naval Receiving Station, Seattle, Washington, March 6, 1952.

[18] Utah, opinion of Attorney General E. R. Callister to Davis County Attorney, April 30, 1955; Florida, letter from Attorney Richard W. Ervin, Office of the Attorney General, to Board of County Commissioners, Hillsborough County, July 25, 1950.

[19] Washington, letter from Attorney General Smith Troy to Hugh H. Evans, Prosecuting Attorney, Spokane County, March 20, 1951; Texas, letter from Attorney General Price Daniel to Hon. Stewart W. Hellman, Criminal District Attorney, Tarrant County, August 22, 1951.

Thus in 17 states, courts or officials have reached a conclusion contrary to that of the Court below.

The legislative history of the Wherry Act shows its purpose was to provide adequate housing at lower rentals for military personnel to help keep skilled men in the military services. This is still true, as is shown by the legislative comment as to the 1955 Amendments to the Housing Act.[20]

Yet, the effect of the imposition of these taxes is to pass on to these very military personnel an increase in rent based on the amount of these taxes.

We accordingly submit that the case is sufficiently important for review by this Court because of the nationwide importance and effect of the taxes, and because of the wide divergence of opinion in the various states as to the proper solution.

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[20] The Senate Report (No. 404, 84th Cong., 1st Sess., p. 19) on the Housing Act Amendments of 1955 states:

> "The Department of Defense testified that there is a net deficit of housing for servicemen and their families at military and naval bases of approximately 234,000 units. The committee was impressed by testimony as to the necessity of eliminating this deficit. One of the paramount considerations is the fact that adequate housing undoubtedly plays an important role in the decision of servicemen to remain in the services. The failure of highly trained specialists to re-enlist results in immediate and substantial monetary loss to the Government. For example, in the Strategic Air Command alone, during the past 4 years, the services of 114,848 airmen have been lost through failure to re-enlist. According to testimony before the committee, the loss of these men and their replacement by others results in a cost to the United States of $1,694 million. Also significant is the fact that Air Force personnel particularly are required to live on the base or very near it, in order that they may be subject to immediate call."

CONCLUSION.

This case involves important questions with respect to the power of the states to impose taxes on leasehold interests in property of the United States located in areas under the exclusive jurisdiction of the United States. The decision weakens the fine inducement to remain in the armed services given by the 1949 Act to experienced married service men. The problem is nationwide and has met different solutions in the different states.

For these reasons, we submit that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX.

A. OPINION OF UNITED STATES DISTRICT COURT.

FORMAN, C. J.:

Plaintiffs, Sheridanville, Inc., and Fort Dix Apartments Corporation, are New Jersey corporations. Each leased land from the United States for the purpose of constructing an apartment house project on its reservation at Fort Dix, Burlington County, New Jersey. After the structures were completed the Borough of Wrightstown, a municipal corporation, through its tax collector, I. Haines Crowshaw, and the Township of Springfield, through its tax collector, R. J. Beazley, in the case of plaintiff, Sheridanville, Inc., sought to collect municipal taxes from it and in the case of plaintiff, Fort Dix Apartments Corp., the said Borough of Wrightstown and its collector likewise sought to collect taxes. Thereupon each corporation filed a complaint in this court against the respective municipalities and collectors above named, which and who sought taxes from it.

The complaint of Sheridanville, Inc. is in two counts. In the first count it alleges, among other things, that on March 30, 1951, the then Secretary of the Army (now Secretary of Defense) of the United States, through his agent executed a lease agreement with it wherein there was leased to it approximately 35 acres of land for a term of 75 years at an annual rental of $1,150, and by the terms thereof it was required to erect and maintain a housing project of 300 units on a site at Fort Dix within the exclusive jurisdiction of the United States; that pursuant to the said agreement

it applied for a mortgage under the provisions of subchapter VIII of Title 12 of the National Housing Act of August 8, 1949, 12 U. S. C. §1748 et seq., and after constructing the housing project leased the apartments to military and civilian personnel as designated by the Commanding Officer of the Fort Dix Military Reservation; that the land leased to it was formerly mainly in the Township of New Hanover, and partly in the Township of Springfield, but pursuant to the provisions of the laws of the State of New Jersey that portion of the land lying within the boundaries of the Township of New Hanover was annexed to the Borough of Wrightstown, N. J. Laws of 1951, c. 182; that no municipal benefits, services or utilities for the project are furnished by the defendant municipalities; that certain facilities are furnished by the military authorities at Fort Dix, electric service is furnished by private public utility corporations and the education of the children of the tenants of the housing project is provided by the Board of Education of the Township of Pemberton, which is fully reimbursed by the United States pending the provision of facilities in the future by the Federal Security Agency, Department of Education of the United States; that the Commissioner of Education of New Jersey has denied the said children admission to local schools upon the grounds that the occupants of the project do not reside in the local school district within the provisions of the laws of New Jersey and the occupants of the housing project have been denied the right to vote because of their military status and non residence within the jurisdiction of the State of New Jersey; that there have been sought to be collected by the defendant municipalities the following taxes:

	Borough of Wrightstown—Assessment on			
	Land	Buildings	Total	Tax
1952	$5,250	$307,500	$312,750	$15,704.55

Township of Springfield—Assessment on	
Personalty [1]	Tax
$19,500	$1,415.70

that similar taxes have been levied by the said defendant municipalities for the year 1953; that plaintiff has paid to the defendant Borough of Wrightstown $10,559.29 under protest and additional moneys for assessments in 1952 and 1953; that the executions of said taxes are illegal and void and the plaintiff seeks recovery of the moneys paid and an injunction restraining the collection of any other moneys alleged by the municipalities to be due and of any other future assessments or taxes.

In Count 2 of the complaint levelled at the Borough of Wrightstown and its tax collector plaintiff, Sheridanville, Inc., among other things alleges that it leased apartment units to military and civilian employees at rental rates governed and determined by the Commissioner of the Federal Housing Administration and approved by the military authorities at Fort Dix; that by the terms of its agreement with the then Secretary of the Army its lease is for the improved land described therein and plaintiff did not lease the improvements which are now erected thereon because they were not in existence at the time of the execution of the lease, by the terms of which they are not a part of the leasehold estate, but title to them is expressly vested in the plaintiff; that the plaintiff is a mere licensee of the United States and because of the limitations imposed upon plaintiff under its agreement it is in effect a management agree-

[1] Later corrected by judgment of Burlington County Tax Board of November 14, 1953, to a real estate assessment in the sum of $27,375.

ment not subject by taxation by the defendants; that by collateral agreements the plaintiff is entitled to a proportionate increase in the maximum rental rates to offset increases in the operating costs of said housing units and the burden of taxes imposed by the Borough of Wrightstown will fall directly on the tenants of said housing project and plaintiff prays for relief against the Borough of Wrightstown similar in nature to that requested in Count 1.

The complaint of the Fort Dix Apartments Corp. is in one count and is similar to that of Sheridanville, Inc. Details of its agreement vary in that its lease was alleged to have been executed April 24, 1952 for approximately 28 acres of land at a yearly rental of $100; that title to the buildings which have been constructed remain in the United States and plaintiff owns neither land nor buildings on which the taxes have been levied for the year 1953 in the total sum of $18,150.72, representing an assessment on the land of $4,050 and on improvements for $306,750.

The County of Burlington and the New Hanover Township Board of Education sought and were granted permission to intervene in each case. They and the defendants filed answers and the issues joined came to trial upon stipulations of facts signed by all of the parties and oral testimony offered at a hearing.

Pertinent portions of stipulations filed by the parties in both suits follow:

> "For the purpose of alleviating the acute housing shortage which existed at the Fort Dix Military Reservation at Fort Dix, New Jersey, and to increase rental housing accommodations available to military and civilian personnel at said military reservation, the Secretary of the Army (now Secretary of Defense) of the United States of America, through his duly authorized agent on March 30, 1950 [as to Sheridanville, Inc.,

and on April 24, 1952 as to Fort Dix Apartments Corp.] executed a lease agreement, pursuant to authority under the Act of August 5, 1947, Chapter 493, Section 1 and Section 6, 61 Stat. 774 and 61 Stat. 775, 10 U. S. C. 1270 and 1270d, and also Subchapter VIII of Title 12 of the National Housing Act of August 8, 1949, 12 U. S. C. 1748 &c., with the plaintiffs wherein the United States of America, among other things, leased to the plaintiff the following described lands:"

* * * * * * * * *

"The above described lands are all within the territorial limits of the Fort Dix Military Reservation at Fort Dix, New Jersey." (Paragraph 2 in each stipulation) [2]

"The agreement, a copy of which is attached hereto as Exhibit A, leased to the plaintiff said lands for a term of 75 years from the date thereof at the annual rental of $1,150.00, [in the case of Sheridanville, Inc., and $100 in the case of Fort Dix Apartments Corp.] and required the plaintiff, among other things, to erect, maintain and operate a housing project, consisting of approximately 300 units, to be located on the Fort Dix Military Reservation at Fort Dix, New Jersey. (Paragraph 3 in each stipulation)

"Pursuant to the terms of said Agreement, the plaintiff applied for a mortgage under the provisions of Subchapter VIII of Title 12 of the National Housing Act of August 8, 1949, 12 U. S. C. 1748 &c., and thereafter erected and constructed a housing project consisting of approximately 300 units, and after completion thereof, leased said apartment units to such military and civilian employees as designated by the Commanding Offi-

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[2] The last sentence appears only in the stipulation in the case of Sheridanville, Inc.

cer of the Fort Dix Military Reservation. At the present time all of said 300 units are leased to military personnel stationed on Fort Dix Military Reservation, and the said units are occupied by the said military personnel and their families." (Paragraph 4 of Sheridanville, Inc. stipulation and Paragraph 8 of Fort Dix Apartments Corp. stipulation.) [3]

"The land leased to the plaintiff was formerly situate mainly in the Township of New Hanover, County of Burlington, and State of New Jersey, and partly in the Township of Springfield, County of Burlington and State of New Jersey, but pursuant to the provisions of the laws of the State of New Jersey, Laws of 1951, Chapter 182, that portion of the land lying within the boundaries of the Township of New Hanover was annexed to the Borough of Wrightstown." (Paragraph 5 of Sheridanville, Inc. stipulation and Paragraph 9 of the Fort Dix Apartments Corp. stipulation, in which, however, no reference is made to the Township of Springfield."

"Title to all or a portion of said lands was acquired by the United States of America by condemnation proceedings in the District Court of the United States for the District of New Jersey entitled United States of America v. Wilbur G. Davis, et al., No. M130a, wherein judgment on the Declaration of Taking was entered on October 16, 1940 and recorded in the Office of the Clerk of Burlington County in Deed Book 926, Folio 446. Judicial notice of said proceedings may be taken by the Court. (Paragraph 6 in each stipulation)

"By letter dated December 31, 1941 Honorable Henry L. Stimson, then Secretary of War, notified Honorable

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[3] The last sentence appears only in the Fort Dix Apartments Corp. stipulation.

Charles Edison, then Governor of New Jersey, that the United States accepted jurisdiction over the said lands acquired by condemnation proceedings effective as of January 8, 1942 at 10:00 A. M. which letter stated that the transfer of such jurisdiction had been authorized by virtue of the provisions of the Act of Legislature of New Jersey appearing as Sections 1, 2 and 3 of Title 52, Chapter 30, Revised Statutes of New Jersey, 1937. By endorsement dated January 2, 1942, Honorable Charles Edison, then Governor of New Jersey, acknowledged receipt of the said letter. * * *" (Paragraph 7 in each stipulation)

"Water and sewerage facilities, garbage and trash collections, snow and road maintenance are provided by the military authorities at the Fort Dix Military Reservation and charged to the plaintiff on the basis of actual cost; fire protection is provided by the military authorities at the Fort Dix Military Reservation and charged to the plaintiff at a nominal cost, police protection is provided without charge by the United States Army; electric service is provided by public utility corporations and is charged to plaintiff at prevailing rates; street lighting within the project has been erected and is operated and maintained exclusively by the plaintiff. Said services are not furnished by the Borough of Wrightstown. The said Borough of Wrightstown or Township of Springfield has not been requested to furnish any such services. The Township of Springfield and or, Intervener, New Hanover Township Board of Education reserve the right to offer proof of instances where services have been rendered to plaintiff, and plaintiff shall have the right to rebut any such proof." (Paragraph 8 in Sheridanville, Inc. stipulation and Paragraph 10 in Fort Dix Apartments Corp. stipulation)

"In 1951, the defendant, Borough of Wrightstown, through its agent, I. Haines Crowshaw, Collector of Taxes, for the Borough of Wrightstown, levied a real estate assessment for 1952 against the plaintiff on real estate purportedly owned by the plaintiff and located within the Borough of Wrightstown; the defendant, Borough of Wrightstown, through its tax assessors, evaluated land purportedly owned by the plaintiff for the sum of $5,250.00 and evaluated buildings owned by the plaintiff for the sum of $307,500.00, for a total valuation of land and improvements in the sum of $312,-750.00; the total tax assessment by the defendant, Borough of Wrightstown on the property of the plaintiff amounts to the sum of $15,074.55 for the year 1952; said defendants in 1952 levied a similar assessment under similar circumstances on real property of the plaintiff for the year 1953 for a total tax assessment of $18,-264.60." [The total tax assessment against Sheridanville, Inc. for 1953 amounted to $18,150.72] (Paragraph 9 in Sheridanville, Inc. stipulation and Paragraphs 11 and 14 in Fort Dix Apartments Corp. stipulation)

"The plaintiff has paid to the defendant, Borough of Wrightstown, the sum of $10,559.29, under protest, for the tax assessment for 1952, and upon the representation by said defendant that said taxes were valid, the plaintiff has also paid additional moneys under similar circumstances for tax assessments for both 1952 and 1953." (Paragraph 10 of Sheridanville, Inc. stipulation)

"In 1951, the defendant, Township of Springfield, through its agent, R. J. Beazley, Collector of Taxes for the Township of Springfield, levied an assessment on personal property owned by the plaintiff in the housing project for the year 1952 and has evaluated the personal property at the sum of $19,500.00; the total tax

assessment by said defendants amounts to the sum of $1,415.70 for the year 1952. Said defendants have levied a similar tax against the personal property of the plaintiff for the year 1953, in the sum of $1,388.40, but the plaintiff has made no payment toward either of said personal property taxes." (Paragraph 11 of Sheridanville, Inc. stipulation)

"The land upon which the housing project of the plaintiff is located is situated mostly within the boundaries of the Borough of Wrightstown and partly within the boundaries of the Township of Springfield." (Paragraph 12 of Sheridanville, Inc. stipulation)

"The payments made by the plaintiff to the Borough of Wrightstown were made under protest." (Paragraph 13 of the Sheridanville, Inc. stipulation)

"A rent increase has been authorized by the Federal Housing Commissioner and an agreement concerning said increase has been executed between plaintiff, the Federal Housing Commissioner, and Camden Trust Company, mortgagee, a true copy of which agreement is hereto attached as Exhibit 'E'." (Paragraph 13 of Fort Dix Apartments Corp. stipulation)

"Plaintiff maintains no offices in the Borough of Wrightstown." (Paragraph 14 in Sheridanville, Inc. stipulation and Paragraph 12 in Fort Dix Apartments Corp. stipulation)

"The facts contained in two letters by Donald C. DeHart, Field Representative, Department of Health, Education and Welfare, Regional Office, Region II, 42 Broadway, New York 4, New York, dated January 20, 1954, and January 27, 1954, copies of which are attached hereto and designated as Exhibits 'B' and 'C', [in Sheridanville, Inc. and 'F' and 'G' in Fort Dix Apartments Corp.] are correct insofar as concerns the number of pupils, where they come from and where they attend,

and the amounts of monies paid and to whom paid. Anything by way of legal conclusions in said letters are not stipulated. * * * Intervener, New Hanover Township Board of Education reserves the right to offer proof regarding the school problem concerning plaintiff's project and the history of the transition of school arrangements for the Fort Dix personnel from the New Hanover Township Board of Education to the Pemberton Township Board of Education and plaintiff shall have the right to rebut any such proof." (Paragraph 15 in each stipulation)

"The question of the right of the residents of the apartment units in question to vote is a legal question and all parties reserve the right to argue the question of law." (Paragraph 16 in each stipulation)

"The taxes collected by the Borough of Wrightstown from the plaintiff are disbursed approximately in the proportions of 5% for local purposes, 45% for school purposes and 50% to the County of Burlington." (Paragraph 17 in each stipulation)

"A true and correct copy of the Budget of the County of Burlington as amended for the year 1953 is attached hereto as Exhibit 'D' [in Sheridanville, Inc. and 'H' in Fort Dix Apartments Corp.]." (Paragraph 18 in each stipulation)

The principles involved in these two cases are identical and they will be treated as one case in the following discussion.

The New Jersey Statute under which the defendants and interveners claim the taxation is authorized is an Act of the Legslature passed in 1949 and is as follows:

"When real estate exempt from taxation is leased to another whose property is not exempt, and the leasing

of which does not make the real estate taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his assignee, and assessed as real estate." N. J. L. 1949, c. 177, p. 566, §1, N. J. S. A. 54:4-2.3.

While broad in its language it would appear from the statement of purpose attached to New Jersey Senate Bill No. 148,[4] from which the Act originated that property of the kind under discussion here was in mind at the time of the adoption of the legislation.

But where the lands are within the exclusive jurisdiction of the United States, under Article I, Section 8, Clause 17 of the Federal Constitution,[5] they are immune from taxation by a state and even private property located thereon

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[4] It is as follows:

"STATEMENT

"The purpose of this Act is to permit Municipalities to levy and assess taxes on exempt property when the same is leased for private use. In many Municipalities the Federal government leases its exempt property to business and industry while the same remains exempt from taxation.

"The first section of this Act is taken from the Illinois Annotated Statutes (Chapter 120, Section 507). It has been upheld by the Courts of Illinois.

"Many other states tax the leasehold estate in lands leased from the United States as the personal property of the lessee. To tax the leasehold estate as real estate avoids the complications inherent in appraising the value of the lease as personal property. A Statute is needed for that purpose. A tax on leasehold estates in property owned by the United States is not considered as a tax on the United States (see 23 A. L. R., page 248)."

[5] "To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—" U. S. Const. Art. I, §8, cl. 17.

is not subject to taxation by a state. Surplus Trading Co. v. Cook, 281 U. S. 647.

Since the lands in question in this case are indubitably within the exclusive jurisdiction of the United States a close application of the foregoing principle would make invalid any effort upon the part of the state or its subdivisions to reach the plaintiffs' properties by taxation. Therefore it becomes necessary to ascertain whether the United States has relinquished its exclusive jurisdiction over these properties to the extent sufficient to give the right to tax them.

Each lease contained the following statement concerning the authority upon which it was purported to be based:

> "THAT, under authority of the Act of August 5, 1947 (10 U. S. C. 1270) and Title VIII of the National Housing Act, as amended (12 U. S. C. 1748-1748h), the Secretary of the Army has determined that the lease of the hereinafter described premises will effectuate the purposes of the said Title VIII, * * *"

Of course that mere recital in the lease is not conclusive as to the extent of the statutory authority referred to therein and it is necessary to examine the legislation itself to determine the nature of the power that was granted.

The authority for the Government's contracts with the plaintiffs is derived from the Military Housing Insurance Act of August 8, 1949 (known as the Wherry Act), 63 Stat. p. 570, 12 U. S. C. §1748. This was an amendment adding Chapter VIII to the National Housing Act, 48 Stat. 1246, 12 U. S. C. §1701, et seq. It provided, among other things, for the Secretaries of the Armed Forces to grant leases for land for Military housing purposes on or adjacent to military reservations. This was to be done to effectuate the purpose of a scheme for financing the construction thereof through the insurance by the Commissioner of the Federal

Housing Administration of mortgages made by the lessees to private financial institutions up to 90% of the cost of construction. A fund for such purpose was to be created out of premiums paid for such insurance and means were provided for the temporary operation of the fund. There is in this legislation a reference to an earlier federal statute wherein the Secretaries of the Armed Forces were authorized in 1947, among other things, to grant leases for real and personal property in the way of plants and equipment that had been used in the manufacture of war essentials, to private parties for periods of not more than five years, where the use of the plant and its machinery would not be materially altered so that should it again be required it could quickly revert to its original purpose of manufacturing war necessities. This reference in the Military Housing Insurance Act is as follows:

> "Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply. • • •" 63 Stat. 576, 12 U. S. C. §1748d.

The 1947 legislation above mentioned commences with the following language:

> "That whenever the Secretary of War or the Secretary of the Navy shall deem it to be advantageous to

> the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, * * *" 61 Stat. 774, 10 U. S. C. §1270.

See the legislative histories of these 1947 and 1949 Enactments respectively in the U. S. Code of Congressional Service, 80th Congress, First Session 1947, p. 1592 and 81st Congress First session 1949, p. 1757.

The 1947 legislation contains the following direct recognition of the liability of property leased under it for taxes assessed by state or local authorities as follows:

> "The lessee's interest, made or created pursuant to the provisions of sections 1270-1270b, 1270d of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated." 10 U. S. C. §1270d.

It is the defendants' contention [6] that this recognition is carried from the 1947 to the 1949 legislation and constitutes a recession by the United States to the State of New Jersey and its subdivisions of the right to tax property leased under the Military Housing Insurance Act. This contention cannot be approved since it appears that the reason for the reference in the 1949 legislation to the 1947 legis-

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[6] The separate contentions of the defendants and interveners will be considered collectively as applying to all and will be referred to herein as "defendants'" contentions or arguments.

lation was to define the types of property which the Secretaries could use for the purpose of the Military Housing Insurance Act and that was such property as was described in the 1947 legislation as was "under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, * * *"

While no direct provision for the payment by lessees of local taxes appears in the Military Housing Insurance Act, as in the enactments authorizing the leasing of standby facilities, there is the following provision:

> "Nothing in this subchapter shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed." 12 U. S. C. §1748f.

And the leases in suit here contain the following provision:

> "That the Lessee shall pay to the proper authority, when and as the same becomes due and payable, all taxes, assessments, and similar charges which, at any time during the term of this Lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments or similar charges are imposed with the consent of the Congress of the United States upon the interest of the Government in the leased premises (as opposed to the leasehold interest of the Lessee therein), this Lease shall be renegotiated so as to accomplish a reduction in the rental provided above, which reduction shall not be greater than the difference between the amount of taxes, assessments or

similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the leased premises prior to the granting of such consent by the Congress of the United States and which shall not in any event be more than 50 per cent of the rental provided above. * * *" (Paragraph 8 of the Fort Dix Apartments Corp. lease attached to the stipulation, which is similar to paragraph 8 of the Sheridanville lease, likewise attached to the stipulation in that case).

The foregoing statutory provision would appear to evidence the intent of the Government to manifest a relinquishment of this property from insulation from local taxation equally with what was legislated in the act authorizing the leasing of standby facilities. As was argued by the defendants certainly it could not have been the intention of the Congress that the Commissioner of the Federal Housing Administration in the event that he should be obliged to capture the property would be in a less preferred position with regard to local taxation than a private corporation such as either of the plaintiffs. While of course the lessees cannot bind the Government to a surrender of its immunity to local tax nevertheless they do show at least an acceptance of the eventuation of such a circumstance and they arrange to place the burden of its cost on the ultimate consumer—the lessees' tenants.

However, the plaintiffs argued that even though it should be granted that the exclusive jurisdiction of the United States was limited to the extent that local taxation was to be permitted the taxes have no justification here because the municipalities afforded no services as consideration for the taxes they sought to impose. The plaintiffs contended that services ordinarily afforded by municipalities were

here provided by the United States or by private sources pursuant to the leases and that residents of the leased areas were not permitted to vote.

It is a fact that the Government supplies water and sewer facilities, garbage and trash collections, fire and police protection and snow and road maintenance and that the federal Government subsidizes the cost of the education of children in the local schools or provides educational facilities.

Of the taxes paid to the municipalities 5% is retained for local needs, 45% for school purposes and 50% to the County of Burlington. Admittedly the plaintiffs' tenants do not take advantage of those which duplicate the services rendered by the Government, but the defendants insist that there are many benefits that the inhabitants of the plaintiffs' projects enjoy, such as the maintenance of roads and law and order in the community in which the occupants of the projects must live, the services of the courts, the county clerk and law enforcement agencies, eligibility (after achieving residence qualification) for treatment at the tuberculosis hospital, mental hospital, welfare house, benefits of the child welfare, old age assistance, county extension service office, library, mosquito extermination commission, etc.

Some point was made of the charge by the plaintiffs that their tenants would not be permitted to vote. An attempt was made to prove this at the hearing, but it proved abortive. However, while the military personnel may not vote under New Jersey law, it has not been shown that the eligible members of the family of military personnel and other civilians housed in the projects, otherwise qualified, will be deprived of voting.

While it is true that there must be the rendition of service to support a tax, the failure to take advantage of protection furnished out of the proceeds of tax funds is no

reason for declaring the tax void when the protection is available. Rainier National Park Co. v. Martin, W. D. Washington 1937, 18 F. Supp. 481, and taxes otherwise lawful are not invalidated by the fact that the resulting benefits are unequally shared, Thomas v. Gay, 1898, 169 U. S. 264; Wagoner v. Evans, 1898, 170 U. S. 588. Nor need the benefits of taxation be direct and tangible, Morton Salt Co. v. City of South Hutchinson, 10 Cir. 1947, 159 F. 2d 897. See also Kiker v. City of Philadelphia, 346 Pa. 624, cert. denied 320 U. S. 741.

Plaintiffs also rely upon an opinion of the Attorney General of the State of New Jersey (Formal Opinion 1951—No. 37) holding that the local authorities were without power to tax the properties in suit here and that the children living thereon are not residents in the local school district within the meaning of N. J. S. A. 18:14-1; [7] and upon an opinion of the Burlington County Court in the case of Borough of Wrightstown v. George Abbott (File No. 1142) on appeal from the judgment of the Municipal Court of the Borough of Wrightstown, which largely followed the aforesaid opinion of the Attorney General and held that the Borough of Wrightstown had no power to apply its building code requirements to one of the buildings in these suits. Neither this opinion nor the opinion of the Attorney General is persuasive for there was no consideration in them of the implication of surrender by the Government of its insulation against taxation implicit in the Military Housing Insurance Act and the circumstances surrounding the use

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[7] Public schools shall be free to the following persons over five and under twenty years of age;

"(a) Any person who is domiciled within the school district;"

* * * * * * * * * * *

"Nonresidents of the school district, if otherwise competent, may be admitted to the schools of the district with the consent of the board of education upon such terms as the board may prescribe." N. J. S. A. 18:14-1.

of the buildings by private interests as has been here discussed.

It is significant that the United States has itself sought no intervention in this case. At most the plaintiffs suggest that it is interested because these projects were encouraged by the Government to fill a need for housing of families of military and civilian personnel employed at Fort Dix and vicariously, so to speak, becomes a military purpose not to be regarded as subject to state or local taxation. The fact is that in no case will the burden of this tax fall upon the United States. Indeed, in the light of the terms and conditions of the plaintiffs' leases the title of the Government to these properties is only a paper one and to all intents and purposes they may well be considered the properties of the private corporate plaintiffs herein, in view of the fact that their complete dominion over the properties extends for a period of seventy-five years—obviously a goodly life term for them. Furthermore, the tax will not fall upon the plaintiffs for it is noteworthy to observe that the arrangements call for tenants to absorb the burden by returning to the plaintiffs their proportionate share of any levy, escrow funds of the tenants' money being already established to indemnify the plaintiffs for any payments they have made or will make if they are ultimately upheld as valid taxes.

The plaintiffs proffer the argument that their rental charges are rigidly controlled by the Commissioner of the Federal Housing Administration, but this hardly seems relevant since ultimately the taxes under no circumstances will come out of their corporate pockets. Of course even though that were the case it is nothing unusual for owners of properties whose incomes are governmentally controlled, such as public utilities corporations, to be liable to state and local taxes nevertheless.

It is likewise provided in the leases that in the event that

the military authorities do not exercise their prerogative to nominate military or civilian personnel and their families as tenants the plaintiffs shall have the right to rent apartments to tenants of their own choosing. Again, in view of the length of the leasing, such a completely private interest in the Government property may well come into being.

So we find that if the tax is sustained it will be a burden upon the individual tenants. Since taxes are accepted as an inevitable universal burden there would seem to be no reason why simply by the circumstances of governmental employment they should enjoy immunity.

Though by a different route I arrive at the same conclusion as did the Court of Appeals of Maryland in the case of Meade Heights, Inc. et al. v. State Tax Commission, 1953, 95 A. 2d 280, when it was confronted by a problem similar to the cases at bar. There the court applied the statutory declaration of relinquishment of immunity from taxation contained in 10 U. S. C. §1270d directly to taxation levied upon a housing project of the same nature as these, a theory with which I cannot agree. As set forth herein I have found that Congress contemplated the equivalent thereof concerning projects authorized by the Military Housing Insurance Act, 12 U. S. C. §1748, and that the plaintiffs' property taxes by the defendants constitute private interests in Government property susceptible of taxation under the law of the State of New Jersey.

Plaintiffs cannot prevail in their actions and judgment must be awarded in favor of the defendants and denying the relief for which plaintiffs have prayed.

Orders for judgment should be submitted or settled by the defendants in accordance herewith.

B. JUDGMENT OF UNITED STATES DISTRICT COURT AND INJUNCTION PENDING APPEAL.

This motion having heretofore come on to be tried before the Court upon an agreed stipulation of facts, with briefs of the parties and arguments of counsel; and the Court having made and filed its findings of fact and conclusions of law;

It is on this 16th day of November, 1954, Adjudged and Ordered that this action be and it is accordingly hereby dismissed and that the defendants, Borough of Wrightstown, a municipal corporation; I. Haines Croshaw, Collector of Taxes for the Borough of Wrightstown; Township of Springfield, a municipal corporation; and R. J. Beasley, Collector of Taxes for the Township of Springfield, recover of the plaintiff, Sheridanville, Inc., a corporation and Fort Dix Apartments Corp., plaintiff, their costs as taxed.

And it is further Ordered that the Borough of Wrightstown, I. Haines Croshaw, The Township of Springfield, R. J. Beasley, County of Burlington and New Hanover Township Board of Education be and they are hereby enjoined from taking any steps to collect the taxes assessed against the properties of plaintiffs, and specifically are enjoined from advertising or selling any tax liens against said properties, or filing any receivership action based on said taxes, or from proceeding in any other manner authorized by law for the collection of taxes, until the appeal from this judgment has been decided by The Circuit Court of Appeals.

And it is further Ordered that Sheridanville, Inc., plaintiff, and Fort Dix Apartments Corp., Plaintiff, shall promptly cause to be deposited with the Clerk of this Court the amount of the escrows held by the mortgagees for 1953 and 1954 taxes, and shall further provide a bond with ap-

proved corporate surety or additional cash for whatever additional sum is necessary to pay the 1953 and 1954 taxes and interest presently due, and shall further cause to be deposited with the Clerk of this Court the amount of escrows held by the mortgagees for taxes that later come due pending the appeal, and shall further provide a bond with approved corporate surety or additional cash for whatever additional sum is necessary to pay the said later taxes and interest, said additional deposits to be made on or before the date said later taxes are due. All of said moneys deposited shall be held by the Clerk of this Court until the determination of the appeal, and thereafter distributed by order of this Court to be entered at that time.

FORMAN,
Chief Judge, United States District Court.

We hereby consent to the form of the above order.

ALFRED M. BITTING,
Attorney for Borough of Wrightstown.

MARTIN L. HAINES,
Attorney for Township of Springfield, and R. J. Beazley.

WILLIAM H. WELLS,
Attorney for County of Burlington, Intervener.

PARKER, McCAY and CRISCUOLO,
Attorneys for New Hanover Township Board of Education, Intervener.

ALEXANDER FEINBERG,
Attorney for Sheridanville, Inc., Plaintiff.
MADISON S. DuBOIS,
Attorney for Fort Dix Apartments Corp., Plaintiff.

C. OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

By HASTIE, Circuit Judge.

These appeals raise the question whether the leasehold interests of two private corporations in apartment housing projects operated by them on the Fort Dix Military Reservation can be taxed by state authorities. It is clear and not disputed that the land on which the projects are located was an area within the exclusive jurisdiction of the United States when appellants entered the picture. Both appellants acquired the tracts in question from the United States on 75 year leases, conditioned upon their providing housing thereon for military and civilian personnel of the armed services. The leases recite that they were executed under the authority of the Act of August 5, 1947, 61 Stat. 774, 10 U. S. C. §1270, providing for the lease of property by the Secretary, and the National Housing Act, 1949, 63 Stat. 570, 12 U. S. C. §1748, providing for the construction and financing of military housing. The Fort Dix Apartment Corp. lease provides that any buildings erected upon the leased premises become, upon completion, the property of the United States, leased to the corporation. Sheridanville's lease, on the other hand, provides that title to any improvements constructed on the leased premises remains in

Sheridanville during the life of the lease, and vests in the United States on termination of the lease only if Sheridanville fails to remove the improvements at that time.

The Fort Dix Apartments project lies within the boundaries of the Borough of Wrightstown, New Jersey, and the Sheridanville project within this borough and the Township of Springfield, New Jersey. The borough has levied real estate taxes for 1953 on the Fort Dix Apartment Corp., based on an assessment of $4,050 for 28 acres of land and $306,750 for the improvements consisting of 300 apartment units. On Sheridanville, Inc. the borough has levied real estate taxes for 1952 and 1953, based on an assessment of $5,250 for 35 acres of land and $307,500 for 300 apartment units. Sheridanville has paid some of the taxes levied by the borough. The Township of Springfield has also levied real estate taxes on Sheridanville. These suits by the two corporations, consolidated on appeal, contest the power of the appellees, the taxing authorities, to collect any of these taxes, because of the jurisdiction of the United States over the project sites. The District Court sustained the taxing power asserted by the New Jersey municipalities.

Appellees agree that in surrendering to the United States exclusive jurisdiction over the military reservation, New Jersey lost all power to tax land and buildings on the reservation. See *Surplus Trading Co. v. Cook*, 1930, 281 U. S. 647. They contend, however, that Congress has receded the right to tax such property as appellants' apartment projects, and that New Jersey has made appropriate provision for the imposition of the contested taxes. To support appellees' view, it is urged that the United States has consented to this taxation in the very statutes on which appellants' leases are based.

The Act of Aug. 5, 1947, authorizing leasing of Defense Department property, provides in part:

"Whenever the Secretary of War or the Secretary of the Navy shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. * * * Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. * * * The authority herein granted shall not apply to oil, mineral, or phosphate lands. * * *

"* * *

"Sec. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. * * *" 61 Stat. 774, 775, 10 U. S. C. §1270, 1270d.

The National Housing Act, concerned primarily with the insuring of mortgages for the construction of military housing, provides in part:

"Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real

> property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply. * * *" 63 Stat. 570, 576, 12 U. S. C. §1748d.

In our view this provision of the National Housing Act merely permits leasing for military housing purposes, already covered by the general authorization of the 1947 Act, to be accomplished without regard to specified restrictions of the 1947 Act, when the elimination of these restrictions would serve the purposes of the Housing Act. Other provisions of the 1947 Act, including the language of Section 6 subjecting the lessee's interest to local taxation, apply to leases made under the authority of both Acts.

We have not overlooked the argument for a narrower view of the scope of the 1947 Act based upon legislative history indicating that the primary purpose of that Act was to provide for the leasing of stand-by defense plants. But the language of the Act extends the leasing authority to all non-surplus property under the control of the Defense Department except oil, mineral, or phosphate lands (an exception which would be unnecessary if the Act applied only to defense plants). An additional indication that the 1947 Act encompasses the leasing of property generally is found in Section 2 which repeals the prior authority for the leasing of War Department property generally, 27 Stat. 321. The Senate Report expresses the reporting

committee's understanding that this prior leasing statute was being "entirely superseded". Sen. Rep. No. 626, 1947, 80th Cong. 1st Sess.

In our opinion the 1947 Act effectively expresses the consent of the United States to the taxation of the lessee's interest in the property leased here, and the National Housing Act leaves this consent unchanged. See *Meade Heights, Inc. v. State Tax Comm'n*, 1953, 202 Md. 20, 95 A. 2d 280.

It is true that the congressional consent applies only to the lessees' interest, and not to any interest which the United States may have retained. However, appellants here have not shown, as in law they must to prevail, that the challenged local taxes were levied on the interest of the United States, rather than on their leasehold interest. See *Siegfried v. Raymond*, 1901, 190 Ill. 424, 60 N. E. 868.

Beyond congressional permission to tax, it is also necessary to the validity of the local taxes here that, pursuant to such permission, the state have granted the municipalities the power to levy the tax in question. We agree with the analysis made by the District Court showing that this has been accomplished here by a New Jersey statute [1] providing for the taxation as real estate of leasehold interests in property tax-exempt to the owner.

The judgment will be affirmed.

McLAUGHLIN, Circuit Judge, dissenting.

I am unable to see how these seventy-five year apartment house leases can be brought within the 1947 Act which

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[1] "When real estate exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his assignee, and assessed as real estate." N. J. L. 1949, c. 177, p. 566, §1, N. J. S. A. 54:4-2.3.

gave authority to lease defense plants to private industry for not more than five years. The plain reason for the reference in the 1949 statute to the 1947 law was to define the types of property which the Secretaries could use for the purpose of the Military Housing Insurance Act (the 1949 Act) as the district judge held.

Nor is there anything in the 1949 Act itself which will support this attempted taxation. The language of the Act relied on by the municipalities reads "Nothing in this title shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed." That clause means here as it does in other titles of the National Housing Act [1] that where property mortgaged under the National Housing Act is acquired by the Commissioner it is not exempted from taxation merely because of the new ownership by an agency of the United States.

The premises involved are within the Fort Dix military reservation and under the exclusive jurisdiction of the United States. They are occupied by military personnel stationed at Fort Dix. They were erected for the purpose of relieving the acute housing shortage at the Reservation and to increase rental housing accommodations there available to military and civilian personnel. All of the various facilities are provided by the Reservation authorities on a basis of actual cost. There are no services furnished by the municipalities.

Without sound basis under either statute the majority

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[1] Title II of the National Housing Act, Act of June 27, 1934, Chapter 847, §208, 48 Stat. 1252, 12 U. S. C. §1714; also in Title VI, Act of March 28, 1941, Chapter 31, §1, 55 Stat. 61, 12 U. S. C. §1741; and in Title VII, Act of August 10, 1948, Chapter 832, Title IV, §401, 62 Stat. 1281, 12 U. S. C. §1747j.

decision is doubly unfortunate in greatly weakening as it does the fine inducement to remain in the armed services given by the 1949 Act to experienced married service men by supplying them with housing they can afford and thus enabling them to have normal married lives within the military establishment.

I would reverse the district court judgment.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Third Circuit.

D. JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
HARRIET G. HUMPHRYS,
Deputy Clerk.

August 23, 1955.

E. STATUTES INVOLVED.

1. The pertinent provisions of the Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. §1748, which added Title VIII—Military Housing Insurance to the National Housing Act, read as follows:

> "Sec. 803. (a) In order to assist in relieving the acute shortage of housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of rental housing accommodations available to military and civilian personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided,* That the aggregate amount of principal obligations of all mortgages insured under this title shall not exceed $500,000,000 except that with the approval of the President such aggregate amount may be increased to not to exceed $1,000,000,000: *And provided further,* That no mortgage shall be insured under this title after July 1, 1951, except (A) pursuant to a commitment to insure issued on or before such date, or (B) a mortgage given to refinance an existing mortgage insured under this title and which does not exceed the original principal amount and unexpired term of such existing mortgage.

"(b) To be eligible for insurance under this title a mortgage shall meet the following conditions:

"(1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire for not to exceed $100 stock or interest in, any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the Military Housing Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Commissioner under the insurance.

"(2) The mortgaged property shall be designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force (including Government contractors' employees) assigned to duty at the military installation at or in the area of which such property is constructed. Notwithstanding the provisions of any other law, preference or priority of opportunity in the occupancy of the mortgaged property for such personnel and their immediate families shall be provided under such regulations and procedures as may be prescribed by the Commissioner. No mortgage shall be insured under this title unless the Secretary of Defense or his designee shall have certified to the Commissioner that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

"(3) The mortgage shall involve a principal obligation in an amount—

"(A) not to exceed $5,000,000; and

"(B) not to exceed 90 per centum of the amount which the Commissioner estimates will be the replacement cost of the property or project when the proposed improvements are completed; and

"(C) not to exceed an average of $8,100 per family unit for such part of such property or project as may be attributable to dwelling use, except that where the Secretary of Defense or his designee in exceptional cases certifies and the Commissioner concurs in such certification that the needs would be better served by single-family detached dwelling units the mortgage may involve a principal obligation not to exceed $9,000 per family unit for such part of such property as may be attributable to such dwelling units.

* * * * * * * * *

"Sec. 805. Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply. Whenever the Secretary of the Army, Navy, or Air Force determines it to be in the interest of national defense, he is hereby authorized to sell, transfer, and convey at fair value (as determined by him),

for use under this title, all or any right, title, and interest in any real property under his jurisdiction, notwithstanding any limitations or requirements of law with respect to the use or disposition of such property. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

* * * * * * * * *

"Sec. 807. Nothing in this title shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

2. The pertinent provisions of the Act of August 5, 1947, 61 Stat. 774, 10 U. S. C. §1270, read as follows:

"[Section 1] * * * whenever the Secretary of War or the Secretary of the Navy [or the Secretary of the Air Force] shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms

and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. Notwithstanding section 321 of the Act of June 30, 1932 (47 Stat. 412; U. S. C., title 40, sec. 303b), or any other provision of law, any such lease may provide for the maintenance, protection, repair, or restoration by the lessee, of the property leased or of the entire unit or installation where a substantial part thereof is leased, as a part or all of the consideration for the lease of such property. In the event utilities or services shall be furnished by the Department concerned to the lessee in connection with any lease, payments for utilities or services so furnished may be covered into the Treasury to the credit of the appropriation or appropriations from which the costs of furnishing any such utilities or services to the lessee was paid. Except as otherwise hereinabove provided, any money rentals received by the Government directly under any such lease shall be deposited and covered into the Treasury as miscellaneous receipts. The authority herein granted shall not apply to oil, mineral, or phosphate lands. The Secretary of War or the Secretary of the Navy, as the case may be, shall submit to the Congress on the 1st

day of January and the 1st day of July of each year, following the enactment of this law, a report of all leases entered into in accordance with the provisions of this Act.

* * * * * * * * *

"Sec. 5. (a) Whenever in the opinion of the Secretary of War or the Secretary of the Navy, as the case may be, the interests of national defense require assurance of the continued availability for war-production purposes of the industrial capacity of shipyards, plants, and equipment which are surplus to the needs of their respective Departments or of the Reconstruction Finance Corporation within the meaning of the Surplus Property Act of 1944, they are authorized to direct the imposition of such terms, conditions, restrictions, and reservations in the disposition of such property by the disposal agency under said Act as will in the opinion of the Secretary concerned be adequate to assure such continued availability.

(b) In the event the disposal agency is unable to dispose of any such industrial plants and equipment subject to such terms, conditions, restrictions, or reservations as have been imposed, within a reasonable time and after such property shall have been offered for sale and reasonable efforts made to dispose of the same, the Department imposing such terms, conditions, restrictions, or reservations shall (1) modify them to the extent necessary to permit the sale or lease of such property, (2) withdraw the property from surplus, or, in the case of Reconstruction Finance Corporation property, request a transfer thereof in the manner provided in sections 3 (a) and 4 of this Act, or (3) elimi-

nate and waive the requirement for the imposition of any terms, conditions, restrictions, or reservations made under the authority of this section.

"Sec. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

3. Housing Amendments of 1955, Public Law No. 345, Ch. 783, 84th Cong. 1st Sess., Approved August 11, 1955. Title VIII of the National Housing Act was amended to read as follows:

"Sec. 803. (a) In order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided*, That the aggregate amount of principal obligations of all mortgages insured under this title shall not exceed $1,363,500,000: *And provided further*, That the limita-

tion in section 217 of this Act shall not apply to this title. *And provided further,* That no mortgage shall be insured under this title after September 30, 1956, except pursuant to a commitment to insure issued before such date.

* * * * * * * * *

"Sec. 805. Whenever the Secretary of the Army, Navy, or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this title, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

* * * * * * * * *

"Sec. 807. The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this title. In the performance of, and with respect to, the functions, powers, and duties vested in him by this title, the Commissioner, notwithstanding the provisions of any other law, shall appoint a Special Assistant for Armed Services Housing for Mortgage Insurance, and provide the Special Assistant with adequate staff, whose whole responsibility will be to expedite operations under this title and to eliminate administrative obstacles to the full utilization of this title under the direction and supervision of the Commissioner."

The 1955 statute contains the following savings provision:

"Sec. 408. Notwithstanding the provisions of section 401 of this Act, the provisions of title VIII of the

National Housing Act in effect prior to the enactment of the Housing Amendments of 1955 shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956 or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be $12,500,000."

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QUESTIONS PRESENTED.

Petitioners have constructed Wherry Apartment projects on the Fort Dix Military Reservation in Burlington County, New Jersey, on lands leased to them by the Secretary of the Army. Certain services normally supplied by municipalities are supplied to these projects by the United States.

Many other normal services are supplied by the municipalities and the County of Burlington, either directly or indirectly.

The question here is whether or not Congress has consented to the taxation of the leasehold interest of the Apartment Operators by the municipalities in which they are situate.

STATEMENT OF THE CASE.

The facts set forth in Petitioners' Brief are substantially accurate; however, their statement that all of the normal municipal services and benefits are supplied by the United States, and not by the municipalities, is disputed. The fact is that the municipalities have many services available to the plaintiffs and the residents of their apartments. Some of these are used and some are not. Some of the services available to, and used by the defendants are the maintenance of roads, the services of the Courts, the maintenance of law and order in the community in which the apartment residents live, the facilities of hospitals, a welfare home, old age assistance, and child welfare. The defendants also have available to the plaintiffs fire and police protection, some water and sewer facilities, and garbage and trash collection. Normally, plaintiffs do not avail themselves of these services (Tr. F93a).

Some point is made of the plaintiffs' contention that residents of the projects cannot vote. This fact was not proved at the hearing and there was no showing that eligible persons residing in the housing projects could not vote by way of absentee privileges, or otherwise (Tr. F93a).

ARGUMENT.

We are here concerned with two housing projects built under the Wherry Act.[1] The question succinctly stated is whether or not this Act permits the taxation by local municipalities of leasehold interests created thereunder, and whether or not this question requires the interpretation of this Court. The United States Court of Appeals for the Third Circuit has decided the question against the petitioners.[2]

Petitioners have argued the question on four separate points. For the sake of clarity, the same arrangement will be followed by the defendants.

I. The 1947 and 1949 Acts and their interpretations.

It is admitted that the United States had exclusive jurisdiction over the lands upon which the apartment projects in question are now situate. It is our position that this exclusive jurisdiction, or that part thereof relating to taxation, was retroceded to the State of New Jersey insofar as the right to tax a private leasehold interest is concerned. The possibility of retrocession was considered by New Jer-

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[1] Act of August 8, 1949, 63 Stat. 570, 12 U. S. C., Sec. 1748.

[2] 225 Fed. (2nd) 473.

sey when the military reservation was ceded to the United States. The Cession Act provided that exclusive jurisdiction should continue only so long as the United States should retain ownership of the lands.[3]

The Act of August 8, 1949, 63 Stat. 570, 12 U. S. C., Sec. 1748 referred to herein as the 1949 Act, or the Wherry Act, provided "whenever the Secretary of the Army, Navy or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply. * * *" 63 Stat. 576, 12 U. S. C. 1748d.

Section 1748f further provides:

> "Nothing in this title shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed." 12 U. S. C. 1748f.

Section 1270d of the Act of August 5, 1947, 61 Stat. 774, 10 U. S. C. 1270 provides:

> "The lessee's interest, made or created pursuant to the provisions of sections 1270-1270b, 1270d of this title

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[3] Laws of New Jersey (1907), Ch. 19; N. J. S. A. 52:30-2. See also, Laws of New Jersey (1938), Ch. 345, p. 885.

shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

The leases in question recited that they were made under the authority of the 1947 and 1949 Acts (Tr. F12a; Tr. S20a).

It seems clear that the basic authority for the petitioner's leases resides in the 1947 Act as carried by reference into the 1949 Act. The legislative history of both Acts supports this conclusion.[4] There is no reference in the Congressional discussion of the 1949 Act to any anticipated tax exemption for Wherry Housing projects. The purpose of the 1949 Act was to encourage the private construction of rental housing for military personnel through special mortgage insurance and cheap government leases. The 1949 legislation was also necessary to remove two restrictions from the 1947 Act, namely, the time limitation on leases and the limitation on leasing for the purpose of housing. The absence of any discussion of tax savings is significant. Congress apparently assumed that the projects were taxable by virtue of the 1947 Act. Further weight is added to this assumption by the provision in the 1949 Act that the lessees should not be entitled to have utilities and related services provided by the United States unless it was determined that these services were not available from a private or other public source. Surely, if such projects used these municipal services, as must be the case with some projects other than those before the Court, it would be extremely unfair to prohibit taxation.

The Congressional intention in passing the 1949 legisla-

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[4] U. S. Code, Cong. Serv. 80th Cong., First Session 1947, p. 1592; U. S. Code, Cong. Serv. 81st Cong., First Session 1949, p. 582.

tion is reflected by the following passage found on page 1764 of the House Report:

> "Section 805 would authorize the Secretaries of the military services to lease property under the authority of the Act of August 5, 1947 Stat. 774 for Housing * * *"

The 1955 amendment of the 1949 Act eliminating the reference to the 1947 Act is no proof of Congressional intent in 1947.

One object of the 1949 Act was to provide housing for military personnel at rentals comparable to, or lower than, those which many were paying for inadequate quarters. Petitioners rely heavily upon this purpose in their argument, claiming the taxation of the projects defeats this object. The record, however, is devoid of any proof that the rentals (including taxes) paid by military personnel at the projects in question were, in fact, higher than rentals for comparable housing.

It is also significant that provision is made for the rental of apartments in the projects to civilians after military priorities are exhausted.

II. The distinction between a retrocession of exclusive jurisdiction and a mere consent to tax property owned by the United States not in exclusive jurisdiction areas, and the absence of services as a constitutional bar to taxation.

A. The retrocession of exclusive jurisdiction, or part thereof, by the United States.

Congress has clearly stated in the 1947 Act that the lessee's interest created by the Secretary of War under that Act shall be subject to local taxation. The Act is the only gen-

eral act giving the Secretary power to lease real property under his jurisdiction. It covers all property under his jurisdiction and consequently military bases are included.

Since, by the Act, the Secretary must find that the leased lands are not required for public use, it is not strange that the lessee's interest is made taxable.

The court below clearly recognized that the lands were under the exclusive jurisdiction of the United States.

B. Services supplied by the municipalities and the necessity thereof for the support of taxation.

Plaintiffs, throughout their petition, insist that the defendants do not supply services to them. This simply is not the case, as the record will show. While it is true that the military authorities provide water and sewerage facilities, garbage and trash collection, fire protection, snow removal and road maintenance within the project area, there are many, many services which they do not and cannot supply, and which are supplied at municipal or county expense. These services are both direct and indirect. The maintenance of law and order in the community by the enforcement of local ordinances by local police, and other authorities, is of great importance to the apartment residents. The operation of the Court system, fire protection, the welfare program, library facilities, and the maintenance of roads and streets leading to the projects are all illustrative of the benefits conferred upon the plaintiffs in this matter. These services are all performed at municipal or county expense. They are specifically referred to in Judge Forman's opinion (Tr. S80a; Tr. F93a). It is not a fact, as stated by plaintiffs (Pet. 22) that children residing in these apartments cannot attend the local schools on a free basis. It is a fact that five children from the projects now attend the local schools

in Wrightstown (Tr. F68a; S45a; Pet. 5). Further, there is no proof, as claimed in the petition (Pet. 22) that persons residing in the apartments cannot vote in any State, County and Municipal elections. On the contrary, plaintiffs' proofs on this point failed (Tr. F93a; Tr. S80a). In addition, it should be noted that families of military personnel, residing on the projects, have the usual rights provided by various States, of absentee voting.

It also appears that many of the services now supplied by the United States are available to the plaintiffs if they desire to use them, and would necessarily be supplied by the municipalities if the National government refused, or neglected, to furnish them.

Plaintiffs have no cause for complaint on the question of services supplied. Their failure to use all of the services of the municipalities does not permit them to avoid the payment of taxes.[5]

III. The nationwide importance of the question.

We concede the fact that there are many Wherry Housing projects throughout the country, all of which are interested in whether or not they are required to pay taxes; however, the mere fact of nationwide interest should not recommend this matter to this Court where the answer to the question is clear.

Plaintiffs cite many cases, some reported, some unreported, and many official opinions to show that there is great confusion concerning this issue. However, an analysis of

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[5] **Rainear National Park Co. vs. Martin,** 18 F. Supp. 481 (D. C. T. W. D. Wash. S. D.); **Thomas vs. Gay,** 169 U. S. 264 (1898); **Morton Salt Co. vs. City of South Hutchinson,** 159 F. 2 897 (C. C. A. 10th 1947); **Kiker vs. City of Philadelphia,** 346 Pa. 624, Cert. Denied, 320 U. S. 741 (1943).

these citations indicates that the upper courts are unanimous in holding that the Wherry Act permits the taxation of the leasehold interest. Thus, the United States Circuit Court of Appeals for the Third Circuit, in the instant case, and the Supreme Court of Nebraska, the Court of Appeals of Maryland, the Supreme Court of Alabama, the Supreme Court of Georgia, and the Supreme Court of New York, are in accord on this question.[6]

The cases cited to the contrary deal with taxation of the improvements as distinguished from the leasehold interest. The Attorney General's opinions to the contrary cited by petitioners were rendered prior to 1953, the year of the decision of *Meade Heights, Inc. v. State Tax Commission of Maryland*, the first decision on the question.

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[6] **Offutt Housing Co. vs. Sarpy**, 160 Neb. 320, 70 N. W. 2 382 (1955); **Meade Heights, Inc. vs. State Tax Commission**, 202 Md. 20, 95 A. 2 280 (1953); **Dayton Development Fort Hamilton vs. Boyland**, 133 N. Y. S. 2 831 (1954); **Brooklyn Manor, Inc. vs. Alabama**, now in Appeal No. 547, First Div. Sup. Ct., Ala.; **Conley Housing Corp. vs. Coleman**, No. 19,001 Sup. Ct. Ga. Sept 12, 1955.

CONCLUSION.

The case involves a question unanimously resolved by the upper Courts throughout the country against the petitioners. The answer to the question is clear; the judgment of the United States Court of Appeals for the Third Circuit is correct, and does not warrant further review of this case by this Court.

Respectfully submitted,

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By MARTIN L. HAINES.
PARKER, McCAY & CRISCUOLO,
Attorneys for Respondents, Borough of Wrightstown, and I. Haines Croshaw, Collector of Taxes for the Borough of Wrightstown, New Hanover Township Board of Education,
By ALBERT McCAY.
WILLIAM WELLS,
Attorney for County of Burlington.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

FORT DIX APARTMENTS CORP., A CORPORATION, PETITIONER

v.

BOROUGH OF WRIGHTSTOWN, A MUNICIPAL CORPORATION AND I. HAINES CROSHAW, COLLECTOR OF TAXES FOR THE BOROUGH OF WRIGHTSTOWN, NEW HANOVER TOWNSHIP BOARD OF EDUCATION, COUNTY OF BURLINGTON

SHERIDANVILLE, INC., A CORPORATION, PETITIONER

v.

BOROUGH OF WRIGHTSTOWN, A MUNICIPAL CORPORATION AND I. HAINES CROSHAW, COLLECTOR OF TAXES FOR THE BOROUGH OF WRIGHTSTOWN, TOWNSHIP OF SPRINGFIELD, A MUNICIPAL CORPORATION AND R. J. BEAZLEY, COLLECTOR OF TAXES FOR THE TOWNSHIP OF SPRINGFIELD, NEW HANOVER TOWNSHIP BOARD OF EDUCATION, COUNTY OF BURLINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The United States respectfully urges the Court to grant the petition for a writ of certiorari which has been filed in this case.

The question in this case is also involved in *Offutt Housing Co.* v. *County of Sarpy, Nebraska*, No. 404, this Term, now pending before the Court on petition for a writ of certiorari to the Supreme Court of Nebraska. It concerns the authority of local taxing units to impose *ad valorem* taxes on housing located on a military reservation over which the United States exercises exclusive legislative jurisdiction.

The Court of Appeals—one judge dissenting—held that the Act of August 8, 1949, c. 403, 63 Stat. 570, commonly referred to as the Wherry Act, by incorporating by reference a part of the so-called Military Leasing Act (Act of August 5, 1947, c. 493, 61 Stat. 774), gave Congressional consent to the exercise of jurisdiction by the local taxing authorities. A similar holding was made by the Supreme Court of Nebraska in the *Offutt* case.

In the belief that such a view of the Wherry Act is in error, and that the action of local authorities in taxing housing on a federal area constitutes an invasion of the sovereign jurisdiction of the United States, the Government, as *amicus curiae*, filed a memorandum in support of the petition for certiorari in the *Offutt* case. It was there urged that a determination of the question was important because of its implications on governmental sovereignty, as well as its effect on the operation of the military departments and the local taxing authorities. For the same reasons, we believe that

the review which petitioners here seek is also warranted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
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